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IN THE

Supreme Court of the United States

OCTOBER TERM 1982

No. 82-2018

MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED,
Petitioner,

v.

JUNG JA MALANDRIS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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July 8, 1983

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OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit, not yet reported, is printed in petitioner's Appendices A through E.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Having found, after a detailed review of the record, that a jury verdict was not tainted by "passion and prejudice," but concluding that the verdict was excessive, did the United States Court of Appeals act within its discretion when it refused to order a new trial and instead directed a remittitur?

STATEMENT OF THE CASE

Respondent Jung Ja Malandris is a naturalized citizen of the United States who was born and raised in extreme poverty in Korea. She has no formal education and she can neither read nor write Korean or English. She met and married Steven Malandris while he was on active duty as a truck driver in the United States Army in Korea. Mr. Malandris had quit school in the tenth grade because of his inability to keep up with his schoolwork. He finally obtained a high school equivalency degree after taking the test three times. After coming to the United States, the couple adopted a spartan lifestyle, spending virtually nothing for anything other than basic necessities and, for example, never going to a movie or a restaurant. (Tr. III 36-47, App. 319-328.)

In order to provide for his wife's financial security, Mr. Malandris worked long hours for United Airlines as a baggage handler. During 1972, he worked every calendar day of the year with the exception of a two week vacation (United Airlines would not permit him to work during his vacation) and about two days off. He frequently worked from 12 to 16 hours per day, including all major holidays. (Tr. III at 48-49, 62-63, App. 329-330, 339-341.) All of his earnings, except those needed for bare essentials, were put into savings accounts in Mrs. Malandris' name only. (Tr. III at 52-54, App. 332-333.) Because she had spent her early life in poverty, Mrs. Malandris was preoccupied with saving money and having control of the savings. By 1973, the couple's unusual lifestyle enabled Mrs. Malandris to accumulate more than $60,000.

In 1973, Mr. Malandris had read a notice on a company bulletin board at work which indicated that if the company went out of business the shareholders would receive more in liquidation than the current price of the stock. Mrs. Malandris, at her husband's urging, took all her money out of the bank and bought shares of United Airlines stock. All the shares were registered in Mrs. Malandris' name only. Later in 1973, Mrs. Malandris decided to put her money back in the bank. Although the stock had been purchased from a brokerage firm in Boulder, Colorado, Mrs. Malandris refused to return to that broker. She was embarrassed when he refused

to open an account solely in her name after he found out that she could not read or write. Mr. Malandris remembered an advertisement placed by Merrill Lynch and contacted Merrill Lynch. (Tr. III at 66-74, App. 343-350.) He was referred to John Barron, a Merrill Lynch account executive who had become a registered broker only four or five months prior to meeting Mr. Malandris. (Tr. VI at 4-5; App. 621.)

At his initial meeting with Mr. Barron, Mr. Malandris told Mr. Barron about his wife's inability to read or write, their lifestyle, and how they had saved all their money. (Tr. VI at 10, 26, 36, App. 625, 638, 647-648.) Mr. Barron then opened an account solely in Mrs. Malandris' name, without ever having met or spoken to her, and falsified information on the new account information form regarding the Malandris' financial background, Mr. Malandris' occupation and Mrs. Malandris' prior investment experience. Merrill Lynch's sales manager approved the opening of the account. (Tr. V at 64-70, App. 562-566.)

After the United Airlines stock was sold, despite Mr. Barron's knowledge of Mrs. Malandris' lifestyle and her desire for financial security, Mr. Barron persuaded Mr. Malandris to use the proceeds from the sale to trade in options on margin, a new and highly speculative form of investment. Mr. Barron represented to Mr. Malandris that his wife would be in a partnership with Merrill Lynch and that she would be guaranteed a profit of $3 per share for every share she bought and that he hoped to get 5,000 shares for her. He stated that Merrill Lynch was doing Mrs. Malandris a favor and that people were fighting for this opportunity. Mr. Malandris wanted to discuss this "partnership" with his wife, but was dissuaded from doing so by Mr. Barron. Mr. Barron told Mr. Malandris to tell his wife that her money was in the bank. (Tr. III at 95-105, App. 366-374.)

Mr. Barron later needed Mrs. Malandris' signature on a power of attorney. He insisted that Mr. Malandris forge his wife's signature on the power and then he had an employee of Merrill Lynch, who had never seen Mrs. Malandris, sign as a witness to Mrs. Malandris' signature. (Tr. I at 32-33, App. 134-135.) Subsequently, when Mrs. Malandris' signature was

again required on other documents, Mr. Barron coerced Mr. Malandris into signing his wife's name by threatening him with jail, asking him who would take care of his wife, since she could not read or write, if Mr. Malandris went to jail. (Tr. III at 114-115, App. 380-381.) Throughout the course of his dealings with Mr. Malandris, Mr. Barron continually represented to Mr. Malandris that his wife's investment was guaranteed.

Mrs. Malandris' account was switched from a cash account to a margin account and an options account was opened for her by Merrill Lynch. The switch and the opening of the option account was approved by Merrill Lynch's designated person. (Tr. V at 73, App. 569.) Mrs. Malandris did not know that she had a margin account or an option account or was dealing in options. (Tr. V at 61-62, App. 558-559.)

Merrill Lynch executed a series of complex transactions in Mrs. Malandris' account during the course of which Merrill Lynch bought for Mrs. Malandris 4,600 shares (in four separate transactions of 3,000, 1,000, 500, and 100 shares) of Northwest Airlines (NWA) for $120,955.09 and sold 46 call options (in three separate transactions of 24, 16 and 6 options each) each with a striking price of $25.00 per share. In purchasing the 4,600 shares of NWA, Merrill Lynch used the $57,520.64 Mrs. Malandris received from the sale of her United Airline stock, all of the $17,737 received as premiums from the sale of the call options and approximately $3,900 of Mr. Malandris' paychecks which he deposited in the account. Because this amount was still not enough to pay for the 4,600 NWA, Merrill Lynch loaned Mrs. Malandris' account over $40,000, pledging all the securities in her account to itself to secure the loan. After Merrill Lynch effected these transactions (without Mrs. Malandris' knowledge or consent), her account was margined to the maximum. Accordingly, her life savings were put at enormous risk by Merrill Lynch. The transactions in Mrs. Malandris' account were approved by Merrill Lynch supervisory personnel.

Near the end of 1973, Mr. Barron called Mr. Malandris and unexpectedly demanded delivery of $42,000, apparently as a maintenance call on the margin account. Mr. Malandris said Mr. Barron knew that his wife did not have any more money;

Mr. Barron said that Merrill Lynch would end the partnership and sell everything. (Tr. III at 125-126, App. 389-390.) The account was subsequently liquidated, with the result that half of Mrs. Malandris' life-savings were lost. Mr. Barron tried to convince Mr. Malandris to keep the whole thing quiet and not to talk to any lawyers. (Tr. III at 128-129, App. 392.)

When Mr. Malandris told his wife of the loss of half of her life-savings, she refused to believe him because she thought her money was in the bank. She did not believe the loss was true. She became very angry at her husband for letting others steal her money. (Tr. IV at 55-56, App. 444-445.) She became increasingly depressed and lost all interest in life.

Mrs. Malandris brought an action against Merrill Lynch for intentional infliction of emotional distress and common law fraud. At the trial, two psychiatrists testified. One psychiatrist had seen Mrs. Malandris in 1972 because of possible psychological bases for infertility. The other psychiatrist was retained and paid for by Merrill Lynch as an expert. They essentially agreed that Mrs. Malandris had suffered severe mental distress and psychological damage as a result of the actions of Merrill Lynch. The trial judge, after hearing the psychiatric testimony, stated in his opinion:

> The evidence also shows, beyond doubt, that Jung Ja Malandris has sustained permanent emotional injury which has destroyed her ability to function as a human being.

(Petition, p. F-4.)

During Mr. Barron's testimony, Mrs. Malandris began to cry and then to scream. The jury was excused as soon as Mrs. Malandris' outburst began. As they were leaving the box, Mr. Malandris jumped up and began to yell and to pound his fists on the seat. Merrill Lynch made a motion for a mistrial which was denied. The jurors were given a cautionary instruction when they returned to the courtroom including, among other things, instructions not to consider the outbursts as evidence, not to allow such occurrences to affect their opinion, and not to judge the case on the basis of sympathy or prejudice. The trial judge noted in his opinion that another day of testimony

and a weekend elapsed before the case was given to the jury. (Petition, p. F-6.)

The jury returned a verdict for the plaintiff for $1,030,000 in compensatory damages and $3,000,000 in punitive damages. Merrill Lynch moved for a judgment notwithstanding the verdict or, alternatively, a new trial on the grounds, among others, that the jury verdict was excessive and that prejudicial emotional outbursts on the part of plaintiff and her husband had occurred during the trial. These motions were denied.

On appeal to a panel of the Tenth Circuit, the judgment was affirmed subject to plaintiffs' acceptance of a remittitur of the punitive damage award. The panel found that the compensatory damage award was adequately supported by the evidence but found the punitive damage award excessive. It also determined that passion and prejudice had not tainted the decision of liability and, therefore, remittitur was proper. (Petition, pp. B-42-43.)

On reconsideration, a majority of the Tenth Circuit *en banc* adopted the opinion of the panel majority. Two of the seven justices who considered the case filed a separate opinion stating that they were convinced that the original award should stand:

> [A]fter reviewing the record in this case, and considering the size of the corporate defendant and the reprehensible nature of the conduct giving rise to the injury, the amount of punitive damages assessed against Merrill Lynch does not shock my judicial conscience.

(Petition, p. E-3.) That opinion also concluded that the "determination of liability [was] not the result of passion and prejudice." (Petition, p. E-4.)

A deadlock among the members of the *en banc* court occurred because two justices believed the original judgment of $4,030,000 should stand, three justices thought the judgment should be reduced to $2,030,000 by remitting the punitive damage award and two justices believed there should be a

new trial. On repolling the justices, one justice who believed the original judgment should stand voted for the remittitur, thereby making a majority of four justices in favor of the majority opinion of the panel.

ARGUMENT

THE *EN BANC* ORDER OF THE COURT OF APPEALS IS CONSISTENT WITH WELL-SETTLED LAW ON THE ISSUE OF THE PROPRIETY OF REMITTITUR BECAUSE OF THE FINDING THAT PASSION AND PREJUDICE DID NOT TAINT THE JURY DETERMINATION.

The focus of Merrill Lynch's petition is the contention that the Tenth Circuit acted in direct conflict with well-settled law in its application of the doctrine of remittitur to a case where the jury determination was tainted by passion and prejudice:

> The issue presented in this case is whether, when a grossly excessive jury verdict follows a course of prejudicial and inflammatory courtroom conduct, a United States Court of Appeals may nevertheless seek to correct the verdict by remittitur, rather than by ordering a new trial.

(Petition, p. 7.) The issue of the appropriate remedy when passion and prejudice influence a jury verdict is not, however, before this Court. No finding of passion and prejudice was made by the trial court, the majority of the Tenth Circuit panel or the majority of the Tenth Circuit *en banc*, which all carefully reviewed the evidence and found ample support for the verdict returned by the jury. Since there was no finding of passion and prejudice by any of the reviewing courts, the order of remittitur was entirely proper.

Indeed, all of the reviewing courts expressly found that the jury verdict was *not* the result of passion and prejudice. The trial court said:

> Considering the evidence as a whole, in my judgment, this jury verdict was produced not by any passion, prejudice or sympathy generated by the plaintiff's conduct or

> that of her husband; it was, rather, the product of a sense of outrage and indignation about the callous and cavalier conduct of the defendant's agent acting in complete disregard of the rights and sensitivities of the plaintiff whose emotional and economic security was in his hands.

(Petition, p. F-6.) The Tenth Circuit panel said:

> [W]e do not feel that the verdict was the result of passion or prejudice so that the determination of liability is tainted; and since we conclude that there is only error in the size of the punitive award, the remedy of remittitur is appropriate.

(Petition, p. B-25.) Circuit Judge Seymour said in her Concurring and Dissenting Opinion:

> For these reasons, and because I conclude that the determination of liability is not the result of passion and prejudice and the award of compensatory damages does not shock my judicial conscience, I would affirm the award in its entirety.

(Petition, p. E-4.)

Merrill Lynch characterizes the decision of the Tenth Circuit now before this Court as "the most recent departure from the principles laid down in" *Minneapolis, St. Paul and S.S.N.R. v. Moquin*, 283 U.S. 520 (1931). This argument, however, must fail. Absent a finding of passion and prejudice, the majority decision of the Tenth Circuit *en banc* followed well-established principles of law, principles recognized by other circuits as well as by this Court. *Kennon v. Gilmer*, 131 U.S. 22 (1889); *Butcher v. Krause*, 200 F.2d 576 (7th Cir. 1952), *cert. den.*, 375 U.S. 997; *Dagnello v. Long Island Railroad*, 289 F.2d 797 (2d Cir. 1962).

In its opinion the Tenth Circuit panel carefully differentiated between the finding of an excessive award and the finding that such excess was the result of passion and prejudice, a significant distinction which Merrill Lynch ignores. As the panel noted, the finding that the verdict was excessive does not lead unavoidably to the conclusion that the liability determination was the result of passion and prejudice:

> This conviction that the punitive award was excessive does not lead us to the conclusion that the liability determination was tainted here.

(Petition, p. B-42.)

Merrill Lynch states in its Petition that, although all three members of the panel agreed that the verdict was excessive, they were "divided, however, as to the appropriate remedy." (Petition, p. 5.) This statement is not a correct summary of the disagreement between the panel majority and the dissent. As Judge Seymour states in her Concurring and Dissenting Opinion,

> The only point of disagreement between the majority panel opinion and the dissent is whether the jury's determination of liability was tainted by passion and prejudice, thus requiring a new trial. The dissent concludes that passion and prejudice did infect the jury's determination of liability and that a new trial is required. The dissent bases that conclusion on what it perceives to be an excessive award of both actual and punitive damages, as well as the occurrence of emotional incidents during trial that the dissent believes inflamed the jury. The majority, on the other hand, concludes that passion and prejudice did *not* affect the finding of liability and that a new trial is therefore not mandated. With respect to the award of damages, the majority finds the actual damages not excessive; however, it finds the punitive damages so excessive that a remittitur is in order.

(Petition, p. E-1, emphasis in original.) The disagreement among the members of the Court was not at all related to the issue of the appropriate remedy.

In light of the findings of the courts below that there was no passion and prejudice, it is difficult to understand how Merrill Lynch is able to make the broad statement that "[t]hat prejudicial and inflammatory misconduct did occur in the trial of the present action is undisputed on the record." (Petition, p. 8.) This conclusory statement, which is at the heart of Merrill Lynch's argument, is entirely without merit. The trial court, the Tenth Circuit panel and the Tenth

Circuit *en banc* all rejected Merrill Lynch's argument that the specific instances to which it points in its Petition were prejudicial. (Petition, pp. B-44-46.) The panel agreed with, and even quoted, the trial court's conclusion that:

> [T]he outbursts [of Mr. and Mrs. Malandris during Mr. Barron's testimony] were genuine human responses to testimony which was not credible and which went directly to the pivotal issues in the case. Mrs. Malandris' actions were entirely consistent with the testimony of both psychiatrists. Mr. Malandris' reaction to the testimony of Mr. Barron can best be characterized as instinctive, uncontrolled anger. It is not possible to try lawsuits in a sterile chamber, wholly free from the effects of human emotion, particularly in a case in which the injury complained of is severe emotional distress. The prejudice to the defendant in this case from the emotional outbursts by the plaintiff is no greater than a plaintiff's display of disfigured or dismembered parts of his body on a claim for physical injury.

(Petition, pp. B-44-45.) The Concurring and Dissenting Opinion of Judges Seymour and McKay takes a similar view of the incident in question:

> The record contains abundant evidence of an outrageous course of conduct by defendant's broker. . . . Viewing the incidents in the context of the trial, I am not led to an irresistible inference that the verdict on liability was the result of the outbursts rather than the jury's extreme indignation over the broker's activities.

(Petition, pp. E-2-3.) As for the comments made during closing argument by plaintiff's counsel, the panel found that they were within reasonable bounds of vigorous advocacy:

> Nor did the closing argument of plaintiff's counsel "so far exceed the bounds of proper argument that we are bound to reverse the district court," as was done in *Draper v. Airco, Inc.*, 580 F.2d 91, 94 (3d Cir.), and *Edwards v. Sears, Roebuck & Company*, 512 F.2d 276 (5th Cir.). Taken together, the theories of liability and the compensatory and punitive damage issues justified fair comment, within reasonable bounds of vigorous advocacy, on

> defendant's conduct, its financial status and the purpose of deterrence.

(Petition, p. B-46.)

Merrill Lynch grossly mischaracterizes an exercise of judicial discretion in failing to grant its motion for new trial, an exercise of discretion which was clearly proper under the circumstances, as a rule of law which is in direct conflict with decisions of other circuits and of this Court. In support of this mischaracterization, Merrill Lynch cites cases, including *Moquin, supra,* in which a finding that the jury's decision had been influenced by passion and prejudice had actually been made. (Petition, p. 10.) Merrill Lynch's argument must fail in light of the findings of the courts below that there was no passion and prejudice and the well-recognized rule that the trial court's determination of whether the verdict is the result of passion and prejudice will not be disturbed on appeal absent clear abuse of discretion. *Pool v. Leone*, 374 F.2d 961 (10th Cir. 1967), *cert. den.*, 389 U.S. 943; *Edwards v. Sears, Roebuck & Company, supra; Gorsalitz v. Olin Mathieson Chemical Corporation*, 429 F.2d 1033 (5th Cir. 1970). *See also, Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474 (1933).

Merrill Lynch's petition relies upon an artificial effort to construct a reviewable issue of law out of its own interpretation of the factual findings of the courts below on the issue of "passion and prejudice." The record speaks far more clearly on this issue than the interpretation of Merrill Lynch. The courts below found no passion and prejudice. Merrill Lynch presents no reason why these thoroughly consistent findings should be reviewed and reversed.

CONCLUSION

For these reasons, it is respectfully submitted that the Petition should be denied.

Respectfully submitted,

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